88-1596

NO. _____

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1988

DR. VENKAREDDY CHENNAREDDY, PETITIONER

v.

UNITED STATES GENERAL ACCOUNTING
OFFICE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Attorney for Petitioner

(703) 525-8387

APPEARANCE FORM
SUPREME COURT OF THE UNITED STATES

No. _____

DR. VENKAREDDY CHENNAREDDY,
Petitioner, vs.
UNITED STATES GENERAL ACCOUNTING OFFICE, Respondent.

The Clerk will enter my appearance as Counsel of Record for DR. VENKAREDDY CHENNAREDDY which IN THIS COURT is the Petitioner. I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature: Walter T. Charlton

Name: Walter T. Charlton

[x] Mr. [] Ms. [] Mrs. [] Miss

Firm: WALTER T. CHARLTON
& ASSOCIATES
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QUESTIONS PRESENTED

I. Is the adverse impact of a U.S. Government Agency's employment practices as to race, age and sex discrimination, which was proven by mere arithmetic summation of correct employment data furnished by the employer, subject to exclusion as "fatally flawed statistics" by the hearing officer for the administrative board?

II. If the answer to issue one is "no"; are the multiple discretionary decisions of a white selecting officer corps adversely affecting an applicant with superior credentials, performance, and seniority, subject to the test of Griggs v. Duke Power

Co., 401 U.S. 424 [91 S.Ct. 849, 28 L.Ed. 2d. 158] 1971 and Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988).

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UNITED STATES GENERAL ACCOUNTING
OFFICE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Dr. Venkareddy Chennareddy, the Petitioner below, on his own behalf petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The principal opinion of the Court of Appeals for the District of Columbia Circuit, No. 88-1076, (Appendix A, hereto, p. 1 A) is unreported. The decision of the full General Accounting Office Personnel Appeals Board underlying this case (Appendix A, hereto, p. A 95 is un-reported.

JURISDICTION

The Order of the Court of Appeals (Appendix A) was entered on December 30, 1988. The jurisdiction of this Court is involved under 28 U.S.C. ¶ 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 732 of the General

Accounting Office Personnel Act of 1979, Pub. L. 97-258, 96 Stat. 897, codified at 31 U.S.C. ¶ 732, provides in pertinent part:

(f)(1) The personnel management system shall (A) provide that all personnel actions affecting an officer, employee or applicant for employment be taken without regard to race, color, religion, age, sex, national origin, political affiliation, marital status or handicapping condition; and * * *

STATEMENT

Petitioner is a 50 year old naturalized American, brown-skinned, of Indian origin, who is a Ph.D. economist/statistician who was hired

in August, 1978 by The United States General Accounting Office (GAO) and promoted to his present grade in April, 1980. GAO purportedly maintains a "merit selection system". That system however, is subject to "gaming" by the dominant white supervisors as evidenced by admissions of the GAO in data submitted incident to hearings in this case.[1/]

The "merit selection system" at GAO is a "layered system" in that applicants for positions must first make a "best qualified list" by

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1/ Petitioner was represented at the administrative level by a staff attorney for the General Accounting Office Personnel Appeals Board (PAB).

establishing a numerical minimum score in the several categories of employment skills for that position. In the five positions applied for below, the applicant, a member of three separate protected classes[2]/ made the "best qualified list". Later, interviews by a white selecting officer corps selected a white candidate in every instance. The employment data furnished by GAO and stipulated into evidence shows for the years 1982 through 1985 no "specialist positions"[3]/ were either

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2/ These were: (1) Racial Minority ; (2) Over 40 i.e. age ; and (3) Sex.

3/ GAO defines specialist positions in part as ..."an academic or functional specialization"... Dr.

held or awarded to minorities in the divisions in the grade level (GS 14) in which Petitioner applied.

The arithmetic result as to a promotion rate is therefore zero (0). Further, no promotions in those divisions were awarded to persons over 40, resulting in a promotion rate for older persons of also zero (0). Moreover, the promotion rate for white women was triple that of white men. Of course, since no minority men were promoted, the rate for minority men is also zero (0).

It is apparent that the

Footnote 3 (Cont.)
Chennareddy is a PHD Economist/Statistician and was conceded by management to be a "highly competent specialist."

foregoing totals and promotion rates are mere arithmetic summations. These totals, summations and recasting were derived by the petitioner from the employment data furnished by GAO and admitted into evidence by stipulation and were not derived by or from any sophisticated "statistical opinion" or disputed testimony, simply because it was not necessary to do so.

In this (above) environment, the Petitioner made application for five separate positions. In each instance his "numerical ranking" under the purported "merit selection system" was greater or equal to his white competitors. In each instance he was

not selected. In the departments in which he applied for promotion, this pattern of (non-selection of minorities) prevailed for fifty three (53) applications for fifteen (15) different positions in ten (10) different announcements in three (3) different departments covering a period of four (4) years.

Out of the 53 total applicants, 41 were whites, and 12 were minority members. All fifteen (15) promotions were awarded to whites, all to persons under 40 and in the ratio of three to one favoring white females.

At hearing, after proving his

"prima facie case"[4]/ and after the refusal of the Hearing Officer to consider an "adverse impact" of the foregoing data, the GAO gave various "articulated reasons" for the non-selection which were inconsistent with the original agency reason given for the non-selection, differed from witness to witness, and, in sum, were self-contradictory and inconsistent.

The Hearing Officer, after first erroneously ruling that the "statistics were fatally flawed", ruled that the GAO had articulated sufficient reasons for the non-selection to deny each promotion.

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[4]/ Throughout this case it has never been disputed that Petitioner had made out a prima facie case.

Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court, although troubled by the obviously low (zero) promotion rate for minorities, could find no flaw in the reasoning of the Hearing Officer.

Petitioner contends that the evidence of discrimination appearing in the basic data admitted by the GAO is an "admission of a party", stipulated into evidence and thus this data is not "mere statistics" subject to exclusion as fatally flawed numbers (however summed) but rather, admitted, stipulated and uncontroverted factual evidence showing a <u>triple zero promotion rate,</u>

discriminatory favoritism of white women, and a strong pattern of racial and age employment discrimination as a matter of evidentiary proof.

Petitioner contends that prejudicial evidentiary error occurred when the Hearing Officer and the Court of Appeals failed to give this basic evidentiary data strong weight as probative evidence of discriminatory adverse impact of the GAO subjective selection procedures. Petitioner contends that having proven his case of adverse impact, the Petitioner shifted the burden of proof in accordance with the rules of Griggs and Watson, supra.

Since the government never

offered any evidence supporting a "business reason" for the adverse impact results proven by the Petitioner, the Petitioner's position was conceded.

Further, Petitioner contends that the Hearing Officer gave improper weight to the contradictive testimony of the [biased] selecting officials. Petitioner contends that the numerical evidence of bias demonstrated along with Petitioner's conceded technical superiority as an applicant renders the reasons given for the non-selection inherently unbelievable.

Both the Court of Appeals and the Hearing Officer clearly erred as

a matter of crucial factual evidence in their analysis of the adverse impact of employment data stipulated into the record.

The government erroneously contended that the statistics presented at hearing were "fatally flawed" because applications were counted twice in the universe of minorities. This contention is erroneous[5/], and the erroneous

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5/ Because (1) duplications appeared in white applications as well as minorities with a substantial off-setting effect; and (2) the figures relied upon at hearing were furnished and stipulated as correct by the GAO, making an objection by GAO improper as a matter of evidentiary procedure; and (3) there was no duplication in counting. The applications counted were in fact, submitted for each of the different positions as requirement for

determination was erroneously relied upon by the Court of Appeals.

Promotion Rates In Evidence

Year 1984-Analysis by RACE- 3 GAO Divisions Where Petitioner Applied

Promotion Rate for Whites (5/16) 31.25%

Promotion Rate For Racial Minorities (0/5) -0-

Proportion of Minorities In Application Pool (5/21)[6]/ 23%

Footnote 5, (Cont.)
consideration for each position as a basic fact of stipulated evidence.

[6]/ In the year 1984 in these specialized positions, 5 promotions were granted (the 5 Petitioner applied for) in three divisions. There were 21 applications, 5 by minorities, all the Petitioner.????

Year 1984- Analysis by RACE-All Divisions at GAO

Promotion Rate for Whites (16/71)[7]/ 23%

Promotion Rate for Minorities (0/14) -0-% proportion of minorities in promotion pool (14/85) = 16%.

Year 1982-1985- Analysis by RACE- 3 Divisions at GAO (Where Petitioner Applied

Promotion Rate for Whites (15/41) 37%

Promotion Rate for Minorities (0/12) -0-% of minorities in promotion pool, proportion (12/53) = 23%.

While the data on promotions principally relied upon for this petition is as to race, similar data for gender protected reasons presented to the Hearing Officer

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[7]/ 16 promotions were granted in specialist positions in the entire GAO out of 85 applications, all to whites.

shows a bias of a factor of 3 (75% promotion rate in favor of white females as compared to a 25% promotion rate for white males) and a zero promotion rate for age protected persons.

In sum, therefore, Petitioner's "promotion potential" can be expressed mathematically as Promotion Potential= (0 for sex bias) x (0 for race bias) x (0 for age bias) or; (0 x 0 x 0) = 0. Thus, in a real world sense, the Petitioner had no possibility at all for a promotion, despite the fact of his superior credentials, performance, supervisory experience and seniority in that grade.

This evidence of overwhelming bias, which petitioner contends is not only representative of his division and the divisions where applications were filed, but are also uniform throughout all of the GAO, conclusively establishes the "adverse impact" of the gerrymandered promotion system at the GAO.

As the Court stated in Teamsters[8]/

> ... "in any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers ... [T]he Company's inability to rebut the inference of discrimination came not from the misuse of statistics but from "the inexorable zero".

8/ International Brotherhood of Teamsters v. United States, 431 U.S. 324, at 342 n. 23. (1977)

REASONS FOR GRANTING THIS PETITION

It is essential to the entire concept of "Equal Employment Opportunity" for the law to repudiate a facially neutral "merit promotion system" in a large government agency that in practice eliminates all minorities from consideration[9]/ for promotion to positions, even those minority applicants who demonstrate technical capabilities, experience and tenure at least as high as each white candidate. Stipulated data

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9/ The purported "merit protection system" at GAO involves a "layered approach", i.e., first "best qualified" persons are selected, then potential selectees are subject to interviews in a "subjective selection process" by white supervisors as in Watson, supra.

presented at hearing by GAO and adopted as joint exhibits show that there was zero racial minority representation in the work force of specialists both before and after the five promotions at issue here in all of the three departments where applications were filed.

It is also important to EEO principles to recognize that under the undisputed facts in evidence in this case, not only were all minorities totally excluded in all promotions but that this triply protected candidate was further subjected to the "adverse impact" of a 100% bias in favor of younger employees and a three to one bias in

favor of (white) women over (white) men. Thus, the cumulative "adverse impact" on this particular promotion candidate gave him the real-world promotion opportunity (despite the fact that he was higher qualified for the five technically-oriented positions than all other applicants) of the proverbial snowball in hell.

Most importantly, the "adverse impact" tests required by Griggs, supra and Watson, supra were never reached in the analysis of either the hearing officer or the U.S. Court of Appeals, because the evidence of the adverse impact was erroneously excluded from consideration by the Hearing Officer. That error occurred

because the Hearing Officer (and the Appellate Court) failed to recognize that the evidence showing the "inexorable zero" as to each of the three promotion rates applicable to this protected employee was actual proof of "adverse impact" derived from stipulated employment data furnished by GAO in accordance with the principles of Griggs and Watson, supra.

CONCLUSION:

If the Hearing Officer perceived some error in numeration, then that officer, or the Court of Appeals upon review, had the duty to inquire into the numerations sufficiently to correct the summed results. However,

Petitioner submits that even if that were done, the results summarized for the Court of Appeals and in this petition are true and correct in all essentials.

The evidence was derived by the employer and stipulated by the parties into the record. It then became evidence of the distribution of promotions by race, age and sex. That evidence is not subject to being "fatally flawed" as would be for example, a statistical opinion based upon faulty data. Because the data was furnished by GAO, GAO cannot be heard to say the data is incorrect. Thus, the tables furnished to the Court of Appeals by Petitioner, which

in fact are correct, are not subject to attack on "statistical" grounds. Similarly the attack by the Respondent on the statistical impact opinion furnished by Petitioner's expert at hearing is misleading and erroneous. The attack should not have been allowed to discredit the opinion of the expert on the basis of faulty data because GAO furnished the [allegedly wrong] data for the use of Petitioner's expert.[10/]

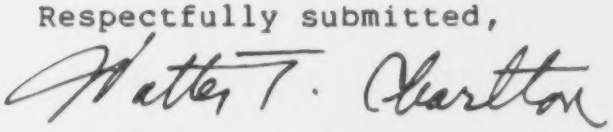
The ruling of the Hearing Officer and the Appellate Court are therefore clearly erroneous on this keystone factual determination.

10/ Nor was the data "wrong", when the stipulated data base at GAO is used as a basis for analysis.

For these reasons, at a minimum, remand for new hearings is vital to the EEO principles established by this Court in Griggs and Watson, supra.

For these reasons the petition for certiorari should be granted.

Respectfully submitted,



Walter T. Charlton
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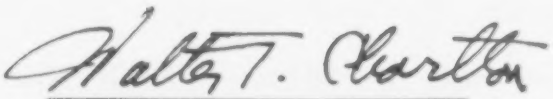
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 1989, pursuant to Rules 19.3, 28.3 and 28.4(a) of the United States Supreme Court Rules, I caused three copies of the foregoing Appearance Form and Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to be deposited in the U.S. mail and mailed first class, postage prepaid to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530, to Carl Moore, Esq., General Counsel, General Accounting Office Personnel Appeals Board, 441 G Street, N.W., Washington, D.C. 20548,

and to Daniel Bensing, AUSA, 555 4th Street, N.W., Judiciary Building, 4th Floor, Room 4815, Washington, D.C. 20001.



WALTER T. CHARLTON, ESQ.
Counsel of Record for the
Petitioner

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 88-1076 **September Term 1988**
Agency No. 70-701-17-85

Dr. Venkareddy Chennareddy,
Petitioner

v.

U.S. General Accounting Office,
Respondent

PETITION FOR REVIEW OF AN ORDER
OF THE UNITED STATES
GENERAL ACCOUNTING OFFICE

Before: WALD, Chief Judge, STARR, and SENTELLE, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the UNITED STATES GENERAL ACCOUNTING OFFICE, and was briefed and argued by counsel. The court has determined that the issues presented

occasion no need for a published opinion. See D.C. Cir. R. 14(c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by the court that the petition for review of the UNITED STATES GENERAL ACCOUNTING OFFICE's decision of January 4, 1988, is denied.

It is FURTHER ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D..C. Cir. R. 15.

Per Curiam
For the Court

Constance L. Dupre
Clerk

No. 88-1076 - Venkareddy Chennareddy v. U.S. G.A.O.

MEMORANDUM

Dr. Venkareddy Chennareddy ("Chennareddy" or "Petitioner") seeks review of a decision of the General Accounting Office ("GAO") Personnel Appeals Board ("PAB" or "Board") rejecting his claims of employment discrimination in his being passed over for five promotions in 1984. After a review of Chennareddy's allegations, the decision of the Board, and the underlying record, we find that no prejudicial error has occurred and deny the petition for review for the reasons set out more fully below.

I. Background

Chennareddy is a brown-skinned, Asian American male of Indian origin. At the time of the relevant promotion applications, he was 46 years old. At all relevant times, he was employed at a grade of GS-13 in the Program Evaluation and Methodology Division of the GAO. In all five of the instances as to which he complains, the positions were ultimately awarded to white, native-born Americans. In four instances the person promoted was younger than Chennareddy, and in two instances the successful applicant was female. Chennareddy alleges discrimination on the basis of race, color, national

origin, and age as to his non-selection for three positions, and race, color, national origin, and sex as to the other two. After an investigation by the Civil Rights Office of the GAO, the Special Assistant to the Comptroller General adopted that office's recommended decision denying Chennareddy's claim. Chennareddy appealed that final agency decision to the PAB. The PAB, after additional investigation, discovery, and hearing, entered a denial of Chennareddy's petition in an opinion by presiding member Kaufmann, concluding "that the evidence before me does not support a finding that Petitioner's non-

selection was the result of discrimination on the part of Respondent by reason of sex, age, race, color, or national origin."

II. Analysis

The parties agree that Petitioner made a prima facie Title VII case for his claims of race, color, national origin, sex, and age discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Garner v. Boorstin, 690 F.2d 1034, 1035-36 (D.C. Cir. 1982). After Petitioner makes a prima facie case, Respondent must "present with clarity and reasonable specificity a legitimate, nondiscriminatory reason" for its actions, Valentino v. United

States Postal Service, 674 F.2d 56, 63 (D.C. Cir. 1982), but is not required to prove that each successful selectee had qualifications superior to those of Petitioner. The Agency retains the discretion to choose among candidates of equal qualification "provided the decision is not based upon unlawful criteria." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). Though the establishment of the prima facie case by Petitioner does place that limited burden on the Respondent under the McDonnell Douglas analysis, the ultimate burden of persuasion never leaves Petitioner, so that upon the

presentation of the legitimate nondiscriminatory reason, Petitioner's burden then requires him to establish that the explanations were not credible or were pretexts for discrimination. See, McDonnell Douglas, supra.

In each instance, GAO has met its burden. While all of the evidence is to the effect that DR. Chennareddy is well-qualified for and performs well in his present position, GAO in each instance presented evidence accepted by the trier of fact that the successful applicant had established skills of interpersonal relationship, better or at least equally suiting them to the

management positions represented by the available promotion. In one instance, the person promoted was within the same division of GAO while Petitioner was not. The appointing official exercised a legitimate preference for an internal promotion of a known applicant over a less-known applicant from another division. In no instance has Chennareddy established that these reasons were petextual or that the Board applied the wrong legal standard. Therefore, we review the application of the legal standard to the facts found. Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985). We review the

factual findings under the substantial evidence standard. Chen v. GAO, 821 F.2d 732, 734 (D.C. Cir. 1987) (citing PAB's enabling statute, 31 U.S.C. § 755). Each finding by the PAB in this instance is supported by substantial evidence and each application of the legal standard is without error.

Our conclusion on the support of the PAB's findings extends to its rejection of Chennareddy's evidence of pretext. Chennareddy offered evidence, of some credibility, that applying certain objective criteria to all the applicants would support a conclusion that he was the better qualified candidate in at least some

of the instances before the PAB and this Court. However, these criteria, comprising a formula developed by an expert witness on Chennareddy's behalf, constitute simply one way of rating promotion applicants, not the only way. The discretion involved in promotion, so long as not influenced by unlawful factors, belongs to the employing agency and not to this Court or the trier of fact. Cf. Texas Dept. of Community Affairs v. Burdine, supra.

Chennareddy further offered statistics designed to show a pattern of racial discrimination. However, the presiding member of the PAB found on substantial evidence that the

underlying data was "fatally flawed"[1]/ and that because of inaccuracies in counting and the small size of the pool, the statistics lacked probative weight. See, Hazelwood School District v. United States, 433 U.S. 299 (1977). While the statistical evidence is disturbing in that it shows zero minority promotions for minorities against fifteen for whites, the findings of the PAB being based on substantial evidence must stand.

A final attack on the PAB's decision alleging unfair surprise in

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1/ Substantial evidence supported the finding that double counting of minority applicants underlay portions of the statistical analysis.

the admission of certain evidence is without support in the record.

III. Conclusion

For the reasons set forth above, we deny Chennareddy's petition for review.

BEFORE THE
PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

VENKAREDDY CHENNAREDDY, Petitioner	)	
v.	)	Docket No. 70-701-17-85
U.S. GENERAL ACCOUNTING OFFICE, Respondent	)	

DECISION OF PRESIDING MEMBER

Petitioner, Venkareddy Chennareddy, Ph.D. is an Economist, GS-110-13, in the Program Evaluation and Methodology Division (PEMD) of the United States General Accounting Office (GAO). He has been employed in GAO since August 13, 1978. He was promoted to his current position in April 1980. (Tr. 13-28; Petitioner's Exhibit 1; Joint Exhibit 14). He is

a male, Asian American, born in India, and who was 50 years of age in 1984, the relevant time period. (Tr. 13, 47; Petitioner's Exhibit 1).

In the 1984 promotion cycle, Petitioner applied for seven GS-14 positions under six different announcements:

> GGD-85-6, Operation Research Analyst;
> NSIAD 85-5, Operations Research Analyst;
> HRD 85-6, Operations Research Analyst;
> RCED 85-4, Operations Research Analyst;
> RCED 85-5, Economist; and PEMD 85-3, Social Science Analyst (2 vacancies)

Petitioner was not selected for any of the seven positions. (Tr. 30-31).

On January 15, 1985 Petitioner filed a Petition for Review with the

Personnel Appeals Board challenging the selections in five of the above actions. The petition alleged discrimination under Title VII of the Civil Rights Act, as amended, 2000e et seq., in the following personnel (promotion) actions on the following bases:

1. Position: HRD-85-6 (Human Resources Division) Operations Research Analyst GS-1515-14. Bases: race, color, national origin and age;

2. Position: RCED-85-4 (Resources, Community, and Economic Development Division) Operations Research Analyst GS-1515-14. Bases: race, color, national origin and age;

3. Position: RCED-85-5 Economist GS-110-14. Bases: race,color, national origin and age;

4. Position: PEMD-85-3 (2 positions)Social Science Analyst GS-101-14. Bases: race, color, national origin, and sex.

The hearing in this case was conducted by the undersigned on July 17, 21, and 22, 1986 in Washington, D.C. Both parties were represented by counsel and they were given a full opportunity to examine and cross-examine witnesses and to offer evidence. Each side filed post-hearing briefs.

I. BACKGROUND AND UNDISPUTED FACTS

During 1984 Petitioner applied

for the above-referenced positions. With respect to two of the positions he applied for (GGD-85-6 and NSIAD 8505), Petitioner was not selected for these vacancies but did not contest this before me.

In regard to HRD 85-6, the selecting official was Richard Fogel, Director, Human Resources Division, a while male, 40 years of age at the time he made the selection under this announcement. Mr. Fogel selected William Isrin, a white male, for promotion under HRD 85-6. Mr. Isrin, a native born U.S. citizen was 36 years of age at the time of his selection. Petitioner's name, along with four others appeared on the best

qualified list for this announcement but Petitioner was not selected. (Tr. 254-58; Joint Exhibit 14, p. 6, Agency's Exhibit 1).

J. Dexter Peach, Director, Resources Community and Economic Development Division, a white male, 46 years of age at the time, was the selecting official for the positions under announcements RCED 85-4 and RCED 85-5. Mr. Peach selected Patrick Doerning, a white male, 39 years of age at the time of selection and a native born U.S. citizen, for the position under the announcement RCED 85-4. For the RCED 85-5 position, he selected Mitchell Rachlis, a white male, age 36 years

of age at the time of selection and a native born U.S. citizen. Petitioner appeared on the best qualified list for RCED 85-4 (one of six persons listed) and also for RCED 85-5 (one of four persons listed) but was not selected for either position. (Tr. 2-3; Tr. 303-22; Agency's Exhibits 2 & 3; Joint Exhibit 14 p. 9-13).

Eleanor Chelimsky, Director, Program Evaluation and Methodology Division, white female, 58 years of age in 1984, was the selecting official for the positions under the PEMD 85-3 announcement. She selected Christine Fossett, a white female, 40 years of age at the time of selection, and Marilyn Mauch, a white

female, 51 years of age, at the time for the two positions. Petitioner was also on the best qualified list for this announcement (one of six listed) but was not selected. (Tr. 1-4, 332-38, Joint Exhibit 11).

2. PETITIONER'S POSITION

Petitioner argues that he was the victim of discrimination in four separate promotion actions involving five vacancies. In all five instances, Petitioner alleged that he was discriminated against by reason of his race, color and national origin. In two of the cases, he also alleged sex discrimination (PEMD-85-3). In the other three cases he alleged age discrimination.

Petitioner asserts that through the presentation of evidence, he established prima facie basis for his claim. He further claims that the so called legitimate, nondiscriminatory reasons provided by the agency, in each instance, can be challenged and shown to e a pretext to cover the true discriminatory reason for the nonselection.

By testimony and stipulation, Petitioner contends that each element of the prima facie case was met. In this regard, he notes that he is a member of a protected class (Asian-American and born in India) who is also a male, brown in color, and 52 years of age. He applied for each of

five positions that he was exceptionally qualified for, but was not selected. All of the employees who were chose were white and either females or under the age of 40.

Having established a prima facie case, Petitioner argues that GAO's proffered justification for denying him promotion -- that the persons selected for the various positions were better qualified than Petitioner -- is but a pretext for discrimination. Dr. James Outtz, a qualified expert Industrial Psychologist, testified that Petitioner's qualifications exceeded the qualifications of the other candidates. Dr. Outtz evaluated the

candidates in four major categories:

1) educational background, 2) professional publications and research, 3) evaluation based upon quality ranking factors and 4) performance appraisals. (Tr. 208-209). Petitioner claims that based upon the comments reviewed, Dr. Outtz made the following finding:

> ...There seems to be a pattern, which is as follows: this pattern indicates that the complainant's [petitioner's] qualifications equaled or exceeded those of the selectee generally in educational background, publications, and in some instances, in quality ranking factors, and that consistently... where there was a difference in favor of the selectee, it was in the area of performance appraisal. (Tr. 213-214).

Petitioner notes that Dr.

Anthony Hill testified that he was employed by the agency to study the BARS (Behavioral Anchored Rating System), a significant part of the performance appraisal system. These studies were of the 1983 and 1984 BARS performance appraisal results for GS-12 evaluators. (Tr. 180). According to Dr. Hill the results of both studies indicated that:

> there are observed differences in the ratings of evaluators based on ethnic/racial group membership....Non-minority evaluators received disproportionately more superior and exceptional ratings than minority evaluators in these job dimensions. (Tr. 186-187).

Dr. Hill further stated that discrimination could be a factor causing differences in the ratings

(Tr. 199). In view of this, Petitioner contends that the selecting officials' complete reliance on the performance appraisals effectively discriminated against him.

Further evidence to support him, Petitioner contends, can be found in the Agency's violation of its own procedures. For example, the selecting official in each of the cases in question eliminated the use of panels to consider the relative qualifications of each candidate. Petitioner argues that GAO Order 2335.8 requires the use of panels when three or more candidates apply for a position, as was the case in

all of the selections in question. He asserts that GAO abused the provision which allows the Assistant Comptroller General for Human Resources to grant requests for exceptions to GAO Order 2335.8. This exception provision is excessively broad and gives carte blanche authority to modify the merit system. Failure to use the panel system, Petitioner argues, enhances the omnipotence of the selecting officials.

This was evidenced, Petitioner notes, by Mr. Fogel's handling of the HRD selection. For example, Mr. Fogel testified that he assumed all the candidates on the selection

certificate were technically competent to be an operations research analyst. (Tr. 262). Because there was no panel, Petitioner asserts that the candidates' qualifications were never reviewed.

An examination of each of the selection processes reveals, Petitioner argues, other serious procedural and substantive errors. In the case of the selection for HRD-85-6, Mr. Fogle testified that he, in effect, turned over the entire selection process to a subordinate, Jim Wright. (Tr. 259). Wright stated that he reviewed the paperwork of all the applicants, interviewed

the, and then recommended the person to be selected without providing the selecting official with written comments or discussing his observations with Mr. Fogle. (Tr. 273, 287). Not surprising, Petitioner observes, the selectee, William Isrin, had worked with Mr. Wright for 10 years and had been evaluated by him. (Tr. 277).

With regard to the two RCED positions, Mr. Peach, the selecting official, claimed that Petitioner was not the best qualified for the position. (Tr. 314, 319). Petitioner asserts that Mr. Peach's credibility was called into question because of his failure to consider the

borderline rating that one of the selectees, Mr. Rachlis, received on his performance appraisal. (Tr. 328, 329). In contrast, the lowest rating Petitioner has received was fully successful. Petitioner also challenges Mr. Peach's claim that he had difficulty communicating with him (Dr. Chennareddy). He questions how Mr. Peach could remember his interview out of 90 others. As further evidence, Petitioner cites the affidavits of 11 GAO employees and the testimony of 8 witnesses, all of whom stated that they had no problem working and communicating with him. (Jt. Exhs. 1-11).

Petitioner also claimed that the

PEMD selecting official, Ms. Chelimsky, violated agency regulations and did not make her selections fairly. In this regard, he noted that Ms. Chelimsky based her decision to not even consider Petitioner because of some memoranda prepared by management officials, Bob Jones, Joseph Delfico and Heber Bouland, that were critical of Petitioner's interpersonal skills. Petitioner notes that while none of these officials testified at the hearing, Mr. Jones and Mr. Bouland had rated his interpersonal skills as either Fully Successful or Superior on his performance appraisals. (Pet. Exhs. 3 and 4). Along with his

brief, Petitioner submitted GAO Guidelines that allow supervisors to keep notes on an employee's performance if certain conditions are met. These guidelines require managers to maintain such notes only for personal use and prohibit the circulations of such notes to anyone else, including other supervisors. ("Managers and Supervisors' Guide to Discipline", Attachment 1 to Petitioner's Brief).

Thus Ms. Chelimsky had based her decision on memoranda that she should not have seen. In Stoller v. Marsh, 682 F.2d 971 (1982) the Court of Appeals for the District of Columbia considered a case involving an Army

employee who alleged that a career screening panel restricted his promotional opportunities based on false and discriminatory evaluations prepared by his supervisors and placed in his personnel file. Petitioner notes that the Court in Stoller held:

> An unfavorable employment decision resulting from inaccurate, discriminatorily-motivated evaluations by the employee's supervisors violated Title VII, unless the employee previously had a reasonable opportunity to inspect the personnel file and have the evaluations corrected. (Emphasis added).

In this instance Petitioner had no opportunity to review this file.

Petitioner notes that Ms. Chelimsky testified that she had

never seen him act in a hostile fashion or fail to handle relationships smoothly or easily. (Tr. 378-379). This is further supported by the testimony contained in the affidavits and statements made at the hearing. (Jt. Exhs. 1-11). Thus, the memoranda, he argues, played a significant role in his non-selection.

Petitioner also cites the testimony of two witnesses who question Ms. Chelimsky's character and reputation for truth and veracity. Dr. Hill stated that he felt he was discriminated against because of his color. In his view, Ms. Chelimsky viewed minorities as

necessary to meet affirmative action requirements but not capable of doing the work. (Tr. 190). Petitioner also points to Dr. Ronald Fishbein, a former employee of Ms. Chelimsky who questioned her reputation for truth and veracity when he stated:

> So I don't know if I could call her a direct liar, but the result was really the same. She could say something one day and mean it that day, and then the next day do a 100 percent aboutface or not even remember that she had said something the day before. (Tr. 165).42

Based on the above, Petitioner argues that he established a prima facie case and then established that the agency's alleged basis for its actions were mere pretext for discriminatory conduct.

3. THE RESPONDENT'S POSITION

Respondent denies that Petitioner was discriminated against on any of the bases alleged or that improper procedures were followed in any of the selections. The evidence, it contends, clearly demonstrates that the selecting officials in question all had legitimate, non discriminatory reasons for not selecting Petitioner based upon a comparison of his qualifications with those of each of the selectees. Respondent maintains that Petitioner was not able to show that the avowed reasons were pretextual or establish any grounds for concluding that any of the allegations of discrimination

were true.

With respect to the selection process, Sara Cytron, a former Program Manager, testified that the selection for the positions in question were made under the Agency Merit Promotion Plan (MSP). This meant that each candidate, including Petitioner, submitted an employee profile (demonstrating his prior experience, education, training and relevant awards), performance appraisals, a supervisor's assessment of the employee's ability on quality ranking factors, and the employee's statement addressing the quality ranking factors. (Tr. 119, Jt. Exh. 12).

Respondent notes that, according to Ms. Cytron, when there are sufficient number of applicants, a panel is convened to review the above paperwork and systematically compare the candidates and develope a list of best qualified candidates for submission to the selecting official. When no panel is convened, the names and relevant documents of all interested candidates are submitted to the selecting official. Petitioner objects that in each of the selections in question no panels were convened and that, in his view, the GAO order on MSP requires the use of panels because the number of applicants in each case exceeded the

number of persons who would be certified as best qualified if a panel was held. (Tr. 129-134, 136-141, Jt. Exh. 12).

In this regard Ms. Cytron testified that if a panel were convened in each instance this is what would have occurred: (1) in HRD 85-6 the panel would have selected three of the five candidates for the best qualified list, (2) in RCED 85-4, the field would have been narrowed down from six to three candidates, (3) in RCED 85-5 the number of candidates would have been narrowed from four to three and for the two PEMD 85-3 positions, six applicants would have been reduced to five.

According to Ms. Cytron, however, Agency regulations permit an exception to the panel requirement which, during this time, was increasingly employed where a panel would only eliminate two or three names from the referral list. She testified that this policy was adopted by Gregory Ahart, Assistant Comptroller General for Human Resources, pursuant to his authority to grant exceptions, and was later formalized in the 1985 MSP Order (Tr. 127-129, 139-140).

Respondent further argues that Petitioner has not established how the failure to convene a panel worked to his disadvantage. Had a panel

been held in each case, Respondent asserts that Petitioner himself could have been eliminated from the certificate. In the absence of a panel, Petitioner was considered with all the other candidates referred for respective selecting officials' consideration.

Once a list of candidates is submitted, Respondent notes that the selecting official has wide discretion in who is selected and how the selection is made. The official may base his or her decision solely on the paperwork submitted, may conduct interviews, and may consult some, all or none of the candidates' supervisors. The selecting official

may also delegate some of his authority to another official to review submissions and/or conduct interviews in order to recommend one candidate over others. (Tr. 144-145, 148-154; Jt. Exh. 12).

Respondent contends that a review of each selection reveals that agency policy was followed and the selections are supported by adequate reasons and documentary evidence. With regard to HRD 85-6, Mr. Fogel, the selecting official, relied upon the interview work and recommendation of Mr. Wright. (Tr. 254-260, 271-273). Mr. Wright testified that he was quite familiar with both Mr. Isrin's and Petitioner's work (Tr.

277-278). He stated that he recommended Mr. Isrin based on his experience and performance of duties. (Tr. 278).

Both Mr. Fogel and Mr. Wright stated that they viewed as important duties for the position the ability to do statistical analyses of large scale data sets that are obtained or created within GAO and the ability to interact effectively on a day-to-day basis with the evaluators who originated the data sets. Mr. Wright believed Mr. Isrin had demonstrated the ability since he had observed Mr. Isrin performing those tasks for a number of years, and in particular was mindful of Mr. Isrin's recent

work as chief data analyst on GAO's review of the block grants program, which, according to Mr. Wright, "was probably the largest data collection effort in GAO's history." (Tr. 265-266, 297-300). According to Mr. Wright, Petitioner did not seem to have any similar experience and he would not have been his second choice for the position. (Tr. 298, 300). Respondent points out that Mr. Wright (age 40) and Mr. Fogel (age 49) were in the same protected age group as Petitioner (Tr. 256, 282).

With regard to RCED 85-4 and RCED 85-5, Mr. Peach testified that he considered each applicant's promotion package as well as the

results of the interviews he conducted. He further stated that he generally had more detailed background and knowledge about the work assignments performed and contributions made by candidates in his own division. (Tr. 307-11, 316, 319).

Mr. Peach stated that he selected Mr. Doerning and Mr. Rachlis, candidates from his own division, based on information gleaned from their paperwork, the interviews and his personal knowledge of their work performance. He also expressed concern about Petitioner's ability to communicate, citing as an example Petitioner's inability to

clearly convey an understanding of the work he performed. (Tr. 312, 215). In making his selection, Mr. Peach stated that he considered the candidates' experience and performance as more relevant than their educational level or quantity of publications. (Tr. 313-314, 320-321). Respondent notes that at the time of the selection Mr. Peach was 46 years old and Petitioner was the only candidate for either position over the age of 40.

As to the PEMD 85-3 selections, Ms. Chelimsky, the selecting official, testified that she did not interview any of the candidates because they were in her division and

she considered herself to be familiar with their work. Respondent cites Ms. Chelimsky's statement that she placed greater weight on the candidates' performance as opposed to their advanced academic credentials. (Tr. 339, 341-43) She further testified that in selecting applicants for the GS-14 level positions, she looked for persons with the managerial capability to be a good supervisor. (Tr. 338, 340). In this respect Ms. Chelimsky stated that she selected Ms. Fossett because she had demonstrated extremely good performance over the period, particularly her work on a politically sensitive assignment

reviewing the Women's Infant's and Children's Program. (Tr. 341-342). She testified that she chose Ms. Mauch based largely on the very strong recommendation the selectee received from her supervisor, Bryan Keenan, and others. (Tr. 341-322). Ms. Chelimsky stated that she also consulted Petitioner's supervisor, Mr. Bouland, whose comments she characterized as "ordinary". (Tr. 344).

Ms. Chelimsky testified that she eliminated Petitioner from consideration because of concern over his interpersonal skills. (Tr. 346-47, 373). Respondent asserts that support for Ms. Chelimsky's last

concern can be found in (1) 1983 meetings with Petitioner, his supervisors and an EEO counselor in which it was recommended that Petitioner take a course in interpersonal relations, (2) a comment in Petitioner's performance appraisal that he would benefit from stress management, (3) difficulties in obtaining a requested transfer for Petitioner and (4) description of his behavior by other observers. (Tr. 348-54, 370-71, 394-96; Jt.Exhs. 2,3,10 and 14; Pet. Exh. 2).

Respondent concedes that Petitioner has offered sufficient evidence to establish a prima facie case of discrimination. In the above

cited evidence, however, Respondent contends that each selecting official has provided legitimate nondiscriminatory reasons for their selections. The burden, therefore, returns to the Petitioner who must establish that these reasons were petextual in nature and that the real reason for the actions was discrimination.

Respondent argues that the evidence the Petitioner put forward to prove pretext was either faulty or unpersuasive. For instance, Petitioner's witness unilaterally established four criteria for judging each candidate that included factors that were not deemed pertinent by the

rating officials such as (1) whether candidates had PHD's, (2) who had the most published articles and (3) their evaluations of quality ranking factors. Dr. Outtz then weighted each of these factors as being equivalent to each candidate's performance appraisal. (Tr. 209-218) He acknowledged that he never interviewed any of the candidates. (Tr. 220-224) Instead, he relied on an arbitrary formula whereby he determined, in many of the instances, that the Petitioner was superior to the selectee because he had published more articles and had a PHD. In so concluding, Respondent asserts that Dr. Outtz effectively ignored the

significantly higher performance appraisals that the selectees received, and the supervisory nature of the jobs for which the parties were competing.

Respondent further claims that Petitioner failed to offer any valid statistical evidence of discrimination. At the hearing, Petitioner had Dr. Charles Mann, a statistician, testify about his analysis of the GAO-wide promotions of GS-14 evaluators. Under cross examination, Dr. Mann stated that his finding that a statistically significant number of minorities were not being selected was based on the assumption that the number he used

represented different minority candidates rather than several different applications from a smaller total number of minority applicants. Respondent notes that Dr. Mann admitted that if the numbers were based on the latter situation, then his statistical analysis was not pertinent (Tr. 238-243). Bert Harris, from the Office of Civil Rights, testified that the figures Dr. Mann used represented numbers of applications (13) rather than actual minority applicants (8) (Tr. 396-403). Based on Dr. Mann's admission, Respondent asserts that Petitioner's statistics are of no value in raising an issue of adverse impact or proving

a claim of disparate treatment.

Respondent also challenges the pertinence of Dr.Hill's testimony. It notes that the study referred to by Dr. Hill involved the review of GS-12 evaluator and evaluates related employees subject to BARS (Tr. 175-185). While the studies noted that differences in the ratings for minorities and nonminorities existed, it made no finding as to the reason for the differences (Tr. 198-199). In addition, Respondent asserts that the studies did not review the ratings of GS-13 employees, which would be more applicable to the Petitioner.

4. DISCUSSION AND ANALYSIS

Petitioner contends that he was denied a promotion because of discriminatory conduct on the part of the selection officials. The order and burden of proof in an individual case of employment discrimination was first set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). 1) The plaintiff must make out a prima facie case; 2) then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason, thus rebutting the plaintiff's prima facie case; 3) if rebuttal is established, the burden shifts back to the plaintiff to show that the

employer's articulated reason is mere pretext, or unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In order to establish a prima facie case where promotion is at issue, Petitioner must show the following:

1. That he belongs to a protected group;

2. That he was qualified for and applied for an existing promotion;

3. That he was denied the promotion; and

4. That other employees of similar qualifications who were not members of the protected group were

promoted at the time Petitioner's request for promotion was denied.

See, Valentino v. U.S. Postal Service, 674 F.2d 56 (D.C. Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

In addition to the above showing, the courts, in age discrimination cases usually require that the plaintiff show that there was a relationship between the adverse action and age. That is, the plaintiff is required to provide some evidence which creates an inference of discrimination. See, Toussaint v. Ford Motor Co., 581 F.2d 812, 815 (10th Cir. 1978). Statistical evidence of discriminatory conduct or

direct or circumstantial evidence of discriminatory intent will suffice to show that age was a factor in the decision by the employer, and thus, will cement the prima facie case.

To rebut the prima facie case,the "defendant must present with clarity and reasonable specificity a legitimate, nondiscriminatory reason:" for not promoting the Petitioner. Valentino, supra. The employer's rebuttal burden is not one of persuading the Court or proving by objective evidence that the person promoted was more qualified than Petitioner, i.e., that Petitioner's objective qualifications were inferior to those of the promotee.

"Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination" Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258-259 (1981). Once the plaintiff has articulated a prima facie case,the defendant bears only the burden of explaining clearly the non-discriminatory reasons for its

actions. Id.

Once defendant has articulated a legitimate, nondiscriminatory reason for Petitioner's non-selection, the Petitioner can only prevail by showing that defendant's proffered reasons are pretextual and that discrimination was the real or most likely cause for the action. McDonnell Douglas; Burdine; Aikens v. U. S. Postal Service Board of Governors, 460 U.S. 711 (1983).

Here, Petitioner has alleged that he was discriminated against in five separate promotion actions on the basis of race, color, age, national origin and sex. There is no dispute that Petitioner was qualified

for the positions in question, each of which was to the GS-14 level. Petitioner made the "best qualified" (BQ) list for each of the positions, which means that, according to objective standards, his qualifications placed him among the highest-ranked five or six persons applying for each position.

Nor is there any dispute that Petitioner established a prima facie case, according to the McDonnell Douglas criteria. Petitioner applied for an existing vacant position, was qualified, was rejected, while each position was filled by a person not of Petitioner's race, color, or national origin and either his sex or

age.

In reply to the presentation of a prima facie case, Respondent, through its selecting officials, must articulate legitimate, nondiscriminatory reasons for choosing each of the selectees rather than Petitioner. In the case of RCED 85-6, Mr. Fogle and Mr. Wright emphasized their need to fill the vacancy with someone that could provide assistance to staff members working of HRD assignments particularly in the area of statistical analysis and use of graphics. Because of the need to communicate on a day-to-day basis with the staff, both Mr. Fogle and

Mr. Wright cited the need for the selectee to have good interactive as well as technical skills. Each testified that they were familiar with the selectee's work and considered him to be highly experienced in the area of statistical analysis and graphics. Mr. Wright praised Mr. Isrin's good interaction skills and noted that Petitioner was far less experienced than the selectee in these areas (Tr. 259-260, 277-280). Mr. Wright also commented that he was surprised at one of Petitioner's responses during the interview which, to the interviewer, indicated either a "cavalier attitude" toward the job or

a failure to "read the signal" in the questions.

With regard to RCED 85-4 and 85-5, Mr. Peach testified that he reviewed each application package, the applicant's representation of their own experience and the performance evaluations, and interviewed about 90 individuals. (Tr. 311). He stated that he recalled in his interview with Petitioner that he found Dr. Chennareddy to be unclear about the kinds of contributions he had been making. (Tr. 312). Mr. Peach asserted that the RCED 85-4 selectee, Mr. Doerning, had communicated clearly in his interview, had

performed well within his unit and that the position being filled required a lot of technical assistance, which placed a premium on communications skills. (Tr. 314-315). As to RCED 85-5, Mr. Peach testified that he selected Mr. Rachlis based on his performance evaluation, the interview and the work projects he had successfully completed while working in the selecting official unit. (Tr. 320). Mr. Peach stated that age was not a factor in his selection and that he was 46 years old at the time he made the selection. (Tr. 321-322).

With regard to the two PEMD selections, Ms. Chelimsky stated that

since these vacancies involved the filling of GS-14 positions, she reviewed the applicants for technical quality, performance and managerial capability. (Tr. 338-340). She testified that she was generally familiar with the work of PEMD applicants and therefore did not interview them. (Tr. 341). Chelimsky further stated that she selected Ms. Fossett because of her outstanding performances on a number of important projects with which she was familiar. Similarly, she noted that she had received a lot of positive feedback from her staff regarding the performance of the other selectee, Ms. Mauch. (Tr. 342-343). She stated

that she had consulted Petitioner's supervisor, Mr. Bouland, and his comments were "ordinary" and "there was no clamor that he be promoted". (Tr. 344). Ms. Chelimsky also stated that she had met with her managers, who told her that Petitioner had trouble dealing with other staff members, and that when she met with Petitioner about this, he became agitated. (Tr. 350-1).

In the above testimony, each of the selecting officials has articulated a reason for not selecting Petitioner that does not involve race, sex, age or any other discriminatory basis. Under the McDonnell Douglas test, the burden

shifts back to Petitioner, who must establish that the articulated, legitimate nondiscriminatory reasons are pretextual and the real basis for the action was discrimination.

In trying to establish pretext, Petitioner presented the testimony of Dr. Outtz to show that Dr. Chennareddy was better qualified than the selectees. In reaching this conclusion, Dr. Outtz relied on his own formula for effectively "grading" each of the selectees. There was no indication, however, that such a formula was either required by the MSP or used by any of the selecting officials. Under GAO order 2335.8, Chapter 4 (1)(b) it simply states:

"Selecting officials may select any candidates referred, based on their judgment of how well each candidate is likely to perform at the grade level being considered" (emphasis added). The vacancies in question were all GS-14, high-graded positions requiring supervisory and/or leadership skills. According to the selecting officials, the ability to orally communicate and the most recent performance appraisals were most important in reaching their decisions. Dr. Outtz acknowledged that he did not interview any of the candidates and thus was not in the same position as the selecting officials to reach a judgment. This,

in my view, is particularly telling given the concerns about the candidates' oral capabilities. In his own written analysis, Dr. Outtz concluded that the selectees, with the exception of Mr. Rachlis, had better performance appraisals ten Petitioner (Pet. Exh. 9). While Dr. Outtz characterizes Mr. Rachlis' and Petitioner's appraisals as about equal, Mr. Rachlis received a "superior" for oral communication while Petitioner received "fully successful" (Pet. Exh. 2 and Jt. Exh. 19). In addition Petitioner's application package includes a notation that he would "benefit from training in communication skills and

stress management." (Pet. Exh. 2)).

In reaching his overall conclusions, Dr. Outtz relied on education background and quantity of articles to tip the balance in favor of the Petitioner. Agency witnesses, however, persuasively argued that at the GS-13 level, educational background was not so important (i.e. all qualified applicants have adequate educational training), and that performance is more significant for these positions. Respondent also noted that the quantity of articles tells the reviewer nothing about quality and it may have no relevance to the work that needs to be performed for the vacancies that were

in question. Based on the most recent appraisals and the selecting official's assessment of the candidates oral skills, it appears that Petitioner did not have superior qualifications.

Petitioner attempted to challenge the validity of the performance appraisal system through the testimony of Dr. Hill regarding BARS. The studies relied on, however, concerned GS-12 evaluators, while Petitioner and selectees were all GS-13's (Pet. Exhs. 6 and 7). Dr. Hill also acknowledged that the studies did not reach any conclusions regarding differences found among various groups (Tr. 198-199).

Petitioner did not offer any appropriate statistical analysis for reaching any specific conclusion from the findings in these studies. Petitioner, in fact, presented no statistical evidence regarding patterns of age or sex discrimination. He submitted some statistical evidence on race discrimination through Dr. Mann's testimony. This latter evidence was rebutted by a GAO witness who established that Dr. Mann's findings were premised on incorrect information (Tr. 396-401; AG. Exh. 8). Petitioner did not even mention it in his brief.

In citing procedural

irregularities, Petitioner relies heavily on the selecting officials' failure to use rating and ranking panels. Chapter 4(1)C of GAO Order 2335.8 states that selecting officials "may" designate a panel when there are more than 3 qualified applicants rather than specifically requiring a panel. Petitioner, moreover, acknowledged the authority of the Assistant Comptroller General for Human Resources to grant exceptions to the use of panels, but objected to what he viewed as excessive use of this exception. In response, Mr. Cytron testified persuasively that it was not cost effective to use the intensive panel

system to eliminate one or two qualified candidates, and the agency had changed the MSP in 1985 after receiving numerous requests for exceptions during the prior years (Tr. 127-29, 139-140).

Even assuming panels had to be convened, Petitioner offered no explanation as to how this practice discriminates against minorities in general, or him as a minority in particular. Similarly, he failed to explain the discriminatory impact of the other practices that he found objectionable. For instance, Petitioner is understandably concerned about Mr. Fogl's delegation of the selection process to Mr.

Wright, and his subsequent selection of Mr. Isrin, a close associate of Mr. Wright, without the benefit of any written or even an oral report. While the regulations do not appear to preclude the delegation of the selecting official's review of candidates, the processing of this selection suggests almost an abdication by Mr. Fogle of his obligation to make the selection. Nevertheless, Petitioner has not indicated how minorities in general or he, as a minority, in particular, was discriminated against by this practice. At best, it appears that everyone, no matter what race, age or sex, other then the selectee, was

disadvantaged. While this may not be the way that the drafters of the MSP intended the selection process to work, it still does not create a basis for Petitioner to succeed on a claim of discrimination.

This same problem exists with Petitioner's challenge of Mr. Peach's credibility. On this point, Petitioner relies on the fact that Mr. Rachlis received a borderline rating for one objective in a 1983 appraisal. In the most recent appraisal (1984) before the selection,however, Mr. Rachlis received superior for this same objective, seemingly indicating that he had resolved any problems he was

having performing in this area. This leaves only Petitioner's challenge of Mr. Peach's memory concerning their interview together. Even assuming, arguendo, that this raises a concern regarding his credibility (which, absent other evidence,it does not) Petitioner still has failed to establish any link to discrimination.

Petitioner went to the greatest length to challenge the validity of Ms. Chelimsky's testimony. With regard to her PEMD selections, the focus was on race and sex discrimination rather than age. Petitioner did not offer any statistical evidence nor did he cite specific incidences to support his

grounds. On paper, moreover, both of the selectees had better overall performance appraisals than Petitioner. Thus, tho prime reason given by Ms. Chelimsky for her selections is supported by the selection packages.

Petitioner instead challenged Ms. Chelimsky's character through the testimony of Mr. Fishbein and Dr. Hill. In Mr. Fishbein's case, he was a former employee who was disgruntled about Ms.Chelimsky's inability to deliver on promises concerning the direction of her division. His comments about the changing of her views from day-to-day is not,as he described it, evidence of lying. In

my view, assertions that she changed her opinion on a given matter, even if true, do not mean that her judgment on another matter, merit selection, is necessarily called into question. There is also no evidence to tie this in to discriminatory motive or intent.

While Dr.Hill testified of the alleged, commonly held view that Ms. Chelimsky discriminates against minorities, he could offer no specific evidence to support this opinion. In contrast to this, Curtis Groves, Jr., another black male who worked for Ms. Chelimsky, denied, in an affidavit, that he ever was discriminated against. While he

stated that he objected to her perceived practice of playing favorites, he also acknowledged that her favorites included females and males (Jt. Exh. 11). Dr. Hill did not offer any specific incidents or supporting evidence to show that his perception, rather than Mr. Groves', was the more accurate view.

Finally we come to Petitioner's contention that Ms. Chelimsky improperly used a "secret file" as a basis for her selection decisions. Petitioner tried to establish the significance of this by citing Stoller. That case involved an Army employee who claimed that he had been discriminated against by reason of

his religion when, he alleged, supervisors had placed incorrect evaluations in his file, which resulted in his failure to be promoted. The Court held that for Stoller to prevail he most prove that his supervisors "prepared materially false or inaccurate evaluations,that they were motivated by illegal discriminatory reasons and these evaluations resulted in his failure to be promoted." 682 F.2d at 981. Putting aside the question of whether the two members constitute a "secret file", none of the necessary elements cited by the court appear in the case at bar. One of the memos at issue was prepared by Joseph Delfico

summarizing a meeting he and Petitioner had with Ms. Chelimsky. (Ag. Exh. 6). The other involved notes about Petitioner's alleged "upset and anxious" conduct over a 4-week period. (Ag. Exh. 7). With regard to the standards enunciated in Stoller, Ms.Chelimsky stated that the Delfico memo accurately reflected their meeting (Tr. 355). More importantly, Petitioner failed to offer any evidence to establish that either the author of the memos or Ms. Chelimsky were somehow motivated by discriminatory intent.

Instead of presenting evidence on the criteria, Petitioner argued, in effect, that the memos were

significant because they imparted information that Ms. Chelimsky should not have seen, and which adversely effected his chances for promotion. The record disclosed, however, that in the case of the Delfico memo it was a summary of a counseling session which Ms. Chelimsky attended. In the case of the second memo, Ms. Chelimsky stated that Mr. Bouland orally reported on problems he was having with Petitioner as well. (Tr. 353-357). The evidence before me indicates, therefore, that Ms. Chelimsky had independent knowledge of the events related in the memo and that she would have possessed this information even if the documents had

not been submitted to her.

Contrary to Petitioner's claim in his brief, Ms.Chelimsky testified to several instances in which she witnessed conduct on the part of Petitioner which, in her view, was not proper for someone who would assume a supervisory position. (Tr. 357, 359-382). While Petitioner may object to Ms. Chelimsky's opinion of his qualifications, the record establishes that these views (whether "correct" or not) are based on actual circumstances and occurrences. He offered no evidence to persuade me that a discriminatory reason actually motivated Ms.Chelimsky.

5. FINDINGS

Petitioner has cited five alleged incidence of Agency illegality. In three instances, GAO was allegedly guilty of discrimination by reason of Petitioner's age, race, color and national origin and the other two concerned supposed discrimination based on sex, race, color, and national origin. It appeared to this trier of fact that Petitioner selected these different categories because in three instances younger men were selected, and in the other two women were chose.

This does not affect Petitioner's ability to enunciate a

prima facie claim, which he clearly has done in this case. In response, each of the selecting officials stated legitimate, nondiscriminatory reasons for their selections. The Agency is not required to convince a reviewing body that it chose the better applicant, but merely provide enough evidence which would "allow the trier of fact to rationally conclude that the employment decisions had not been motivated by discriminatory animus". Valentino 674 F2d at 60. Respondent ha met this burden. Furthermore, there is ample evidence in the record showing that each of the selectees had better performance appraisals than

Petitioner. Performance appraisals were cited as the primary criterion considered in each of the selections.

The burden then shifted back to Petitioner, who was unable to offer any pattern or practice or statistical analysis from which discriminatory impact is shown or suggested. The only common thread in these selections, the decision not to use panels, was based on apparent considerations (economy of resources) unrelated to discrimination. Furthermore, Petitioner was not able to enunciate how this decision was discriminatory or ever had an adverse effect on him.

Instead, this Presiding Member

is left with a potpourri of allegations involving selecting officials of varying ages and sexes. The allegations against them are without pattern and limited to a few specific aspects of each selection process. At best one could discern a preference on the part of these officials for individuals they knew and worked with. In the case of Ms. Chelimsky, her personal knowledge of Petitioner had a negative impact on his chances to be chose. This, however, provides no basis for finding discriminatory intent or motivation.

6. ORDER

It is my conclusion that the evidence before me does not support a finding that Petitioner's non-selection was the result of discrimination on the part of Respondent by reason of sex, age, race, color or natural origin. I, therefore, order that the petition be denied.

August 20, 1987
Date

Jonathan E. Kaufmann
Jonathan E. Kaufmann
Presiding Member

NOTICE

BOARD REVIEW:

This decision will become final on October 2, 1987 unless a Motion to Reopen and Reconsider is filed by one of the parties on or before September 25, 1987 or unless the Board reopens on its own motion. A motion to Reopen and Reconsider may be filed with the Board in person at the office of the Board (Academy Building, 717 Fifth Street, NW.) or by mail addressed to the GAO Personnel Appeals Board, Academy Building, 441 G Street, NW., Washington, D.C. 20548. When filed by mail, the postmark shall be the date of filing. The party filing the

Motion to Reopen and Reconsider shall serve a copy of the Motion on other parties. The Motion to Reopen and Reconsider shall set forth objections to the decision, with references to applicable laws or regulations, and with specific reference to the Record. The responding party shall have 20 days from receipt of the Motion to file any reply. Additional responsive pleadings may be filed only with the approval of the Board. The Board may grant a Motion to Reopen and Reconsider when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the Record was closed; or

(2) The decision of the Presiding Officer is based on an erroneous interpretation of status or regulation; or

(3) The decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or

(4) The decision is not made consistent with required procedures; or

(5) The decision is unsupported by substantial evidence.

JUDICIAL REVIEW:

In the event that there is no Motion to Reopen and Reconsider, making this the final decision, be advised that under 31 U.S.C. Section 755, any final decision of the Board regarding subsections (1), (2), (3), (6), and (7) of 31 U.S.C. Section 753(a), may be appealed to the United

States Court of Appeals for the Circuit in which the Petitioner resides or to the United States Court of Appeals for the District of Columbia, within 30 days after the date this decision becomes final, as described above. Alternatively, the Petitioner may seek a trial de novo in the appropriate United States District Court, pursuant to Title VII of the Civil Rights Act of 1964, as amended, by filing a complaint with such District Court within 30 days after the date this decision becomes final.

BEFORE THE
PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

VENKAREDDY CHENNAREDDY
Petitioner,
v. Docket No.
70-701-17-85
U.W. GENERAL ACCOUNTING OFFICE
Respondent.

DECISION OF THE PAB

INTRODUCTION

This matter is before the Board on a motion by Petitioner to reopen and reconsider the decision of the Presiding Member finding that Petitioner's nonselection for five promotions to GS-14 was not discriminatory.

In his original Petition for Review filed with the Board on December 24, 1985, Petitioner alleged

that on three separate occasions in 1984, the Agency discriminated against him by failing to promote him to GS-14 because of his age, race, color and national origin. In two other separate instances, Petitioner charged that his nonselection was based upon his sex, race, color and national origin. After a full evidentiary hearing, the Presiding Member ruled on August 20, 1987, that none of the five selection decisions was discriminatory.

In his motion to reopen and reconsider, the Petitioner contends that the decision of the Presiding Member was arbitrary, capricious, an abuse of discretion and otherwise not

consistent with law. Further, Petitioner claims that the decision is not supported by substantial evidence. The Agency has duly opposed the motion.

Petitioner argues that the Presiding Member committed prejudicial error when he denied Petitioner's prehearing request to require the Agency to file a formal response to his Petition for Review. Petitioner argues that the Presiding Member's, denial of this request allowed the Agency to articulate a new reason for Petitioner's nonselections, and thus deprived Petitioner of a full and fair opportunity to show that the

articulated explanations were pretextual. The Petitioner contends that for the Presiding Member to deny the motion for clarification and then to permit the Agency to present evidence during the evidentiary hearing of a different defense than that proffered in the Final Agency Decision was arbitrary, capricious, an abuse of discretion, and not consistent with the law governing employment discrimination cases. We find no error and that Petitioner was given ample opportunity prior to the evidentiary hearing to ascertain the exact reasons the Agency asserted as the basis for its failure to select him for promotion to GS-14. In fact,

our review of the record shows that Petitioner deposed each of the Agency's selecting officials, and that the testimony of each official during their deposition was substantially the same as that given during the evidentiary hearing. It seems clear and Petitioner does not argue otherwise, that is the same evidence which the Presiding Member considered in rendering his decision. We see no error by the Presiding Member in this regard.

Petitioner also contends that the decision of the Presiding Member is not supported by substantial evidence. We find nothing in the Motion to Reopen and Reconsider which

refutes the reasoning of the Presiding Member. The language in a Motion to Reopen and Reconsider must contain sufficient specificity to enable the Board to determine whether there is a serious evidentiary question which warrants a complete review of the record. See, Weaver v. Department of the Army, 2 MSPB 297, 299 (1980), aff'd., 699 F. 2d 613 (9th Cir. 1982). Petitioner must make specific references to the record and the findings of the Presiding Member in order to meet the criteria for review of the entire record. Id. The Presiding Member found that the Agency articulated legitimate, nondiscriminatory reasons

for Petitioner's nonselection to the five positions in question, and that Petitioner had failed to carry his burden of proving those reasons pretextual. The findings of the Presiding Member are supported by substantial evidence, and while Petitioner takes issue with these findings, and would have us interpret the evidence otherwise, we find nothing in the Petitioner's motion sufficient to persuade us that further review is warranted.

Accordingly, Petitioner's Motion to Reopen and Reconsider is DENIED.

/S/
Jessie James, Jr.

Date: January 4, 1988

JUDICIAL REVIEW

This is a final decision of the Personnel Appeals Board, and pursuant to 31 U.S.C. †755, any final decision of the Board regarding subsections (1), (2), (3), and (7) of 32 U.S.C.)753(a) may be appealed to the United States Court of Appeals for the circuit in which the Petitioner resides or to the United States Court of Appeals for the District of Columbia within 30 days after the date the Petitioner receives notice of the final decision from the Board.

Alternatively, the Petitioner may seek a trial de novo in the appropriate United States District Court, pursuant to Title VII of the

Civil Rights Act of 1964, as amended, by filing a complaint with such District Court within 30 days after the date the Petitioner receives notice of the final decision from the Board.

BEFORE THE UNITED STATES
GENERAL ACCOUNTING OFFICE
PERSONNEL APPEALS BOARD

VENKAREDDY CHENNAREDDY,
Petitioner

v. Docket No.
70-701-17-85

GENERAL ACCOUNTING OFFICE,
Respondent

ORDER

Background

This matter is before the Board on Petitioner's objection to our decision of January 4, 1988, denying Petitioner's motion to reopen and reconsider the decision of the Presiding Member in this case. The Presiding Member's decision, dated August 20, 1987, concluded that Petitioner's non-selection for five promotions to GS-14 was not the result of discrimination by the

Respondent. Petitioner contends that our decision denying his appeal was erroneous because it was based on evidence which was not a part of the record below in this case. Petitioner requests that, in the interest of justice, we review our decision of January 4. We have granted Petitioner's request and re-examined our decision to deny Petitioner's motion to reopen and reconsider. In revisiting that decision, we have also re-read the record before us on appeal, and we find nothing to persuade us that our January 4 decision should be disturbed.

Petitioner filed his motion to

reopen and reconsider on September 22, 1987. Petitioner contended that the Presiding Member's finding that Petitioner had not been discriminated against was arbitrary, capricious,an abuse of discretion and otherwise not consistent with law. Petitioner also contended that the Presiding Member's decision was not supported by substantial evidence.

Petitioner's initial argument in his motion for reconsideration was that the Presiding Member committed prejudicial error when he denied Petitioner's prehearing request to require Respondent to file a formal response to his petition for review. Petitioner argued that the Presiding

Member's denial of this request allowed Respondent to articulate a new reason for Petitioner's non-selections, and thus deprived Petitioner of a full and fair opportunity to show that the articulated explanations were pretextual. Petitioner contended that for the Presiding Member to deny the motion for clarification and then to permit Respondent to present evidence during the evidentiary hearing of a different defense than that proffered in the final agency decision was arbitrary, capricious, an abuse of discretion, and not consistent with the law governing employment discrimination cases.

Respondent filed its opposition to Petitioner's motion to reopen and reconsider on October 13, 1987. In its brief, Respondent contended that it had made all the response necessary to the petition for review, and that further, Petitioner had had ample opportunity to develop his case in full and discover the Agency's position through both the PAB General Counsel's initial investigation of the Petitioner's charge, and through subsequent prehearing discovery. Respondent argued that Petitioner had served each selecting official with interrogatories and had also deposed each of them to ascertain exactly why each official had not selected the

Petitioner for the position in question. In support of this argument, Respondent appended excerpts from the interrogatories and depositions conducted by Petitioner wherein the Agency officials, in response to Petitioner's questions, stated their exact reasons for preferring other candidates over Petitioner.

In our January 4, 1988, decision denying Petitioner's motion to reopen and reconsider, we agreed that Petitioner had been given ample opportunity to discover the Respondent's position and that the Presiding Member had committed no error in denying Petitioner's motion

for a definite response to the petition for review. In our ruling we cited the evidence of the depositions as support for our decision.

On February 2, 1988, Petitioner filed his objection to the basis of our decision, arguing that the interrogatories and depositions appended to Respondent's brief were never submitted into evidence at the hearing before the Presiding Member and, therefore, it was error for the Board to have considered them on appeal.

Analysis

The general rule is that a reviewing body cannot act on any

evidence that was not before the trial court, nor receive any document or evidence that was not a part of the hearing record. Coplin v. United States, 761 F.2d 688, 691 (Fed. Cir. 1985), affirmed sub nom, O'Connor v. United States, 107 S.Ct. 347 (1986). Parties on appeal may rely only on those materials furnished to the trial examiner, and may not append materials to their briefs that were not before the trial court. Benn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987). Efforts to supplement the record by attachments to a party's briefs are improper. Rebuck v. Vogel, 713 F.2d 484 (8th Cir. 1983). Thus, even if

Petitioner's depositions and interrogatories had been brought to the attention of the Presiding Member through briefs and oral argument, we could not consider them unless they were actually made part of the record. In re Arthur Anderson & Co., 621 F.2d 37, 39-40 (1st Cir. 1980). However, appellate bodies do have the authority to supplement the record or take notice of evidence necessary to come to an equitable resolution of the controversy. GHR Energy Corp. v. Crispin Company, Ltd., 791 F.2d 1200, 1202 (5th Cir. 1986); Karman v. Commissioner of Internal Revenue, 749 F.2d 567, 570 (9th Cir.), cert. denied, 106 S.Ct. 66 (1984);

Dickerson v. Alabama, 667 F.2d 1364, 1367 (11th Cir.), cert denied, 459 U.S. 878 (1982). See also, Salinger v. Random House, Inc., 818 F.2d 252, 253 (2nd Cir. 1987). Moreover, if the record before us was inaccurate at the time we were deliberating Petitioner's motion to reopen and reconsider, it was Petitioner's responsibility to bring such fact to our attention. It is well settled that the party bringing the appeal has the responsibility to insure that the record before the appellate tribunal is accurate. GHR Energy Corp. v. Crispin Company Ltd., supra. The improper evidence was before the Board for almost three months before

we issued our ruling, and although Petitioner was served with a copy of the Respondent's brief and appended discovery materials at the same time the Board was served (October 13, 1987), Petitioner did not call the error to the Board's attention, nor request in any manner that the improper materials be struck from Respondent's pleadings. Thus, Petitioner's failure to object to Respondent's pleadings in a timely manner waived his right to now so object. Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982); Order of Railway Conductors v. Clinchfield Railroad Co., 407 F.2d 985, 988 (6th Cir.), cert denied, 396 U.S. 841

(1969). The Merit Systems Protection Board has also ruled that failure to timely object waives a party's right to later object to the basis of a ruling. Brown v. Department of Navy, 21 M.S.P.R. 204, 84 F.M.S.R. 5465 (1984).

Petitioner's having waived his right to object to Respondent's pleadings renders the Board's action, in our view, harmless error at most. See, Marshall v. City of Cape Coral, Fla., 797 F.2d 1555 (11th Cir. 1986). An error is considered harmless if it does not injuriously affect the substantive rights of the complaining party as regards the outcome of the decision. See, e.g., Eastburn v.

Ford Motor Co., 471 F.2d 21, 23 (5th Cir. 1972), cited in Bass v. United States Department of Agriculture, 737 F.2d 1408, 1414 (5th Cir. 1984). Clearly, the denial of Petitioner's prehearing motion stands independent from the fact that Petitioner had an opportunity to discover the Respondent's case prior to hearing, and that is all our rules, and fundamental fairness, require. Although we mentioned the depositions in our January 4 ruling, our holding was premised, not on what Petitioner's discovery revealed, but on the fact that Petitioner did, indeed, have an opportunity to discover Respondent's case. Having

had the opportunity to discover the case, Petitioner cannot now argue that the Presiding Member's denial of Petitioner's prehearing motion is what kept him from ascertaining the Respondent's defense.

Petitioner does not take issue with our review of the merits of the Presiding Member's decision, so we need not address the remaining portions of our decision denying the Petitioner's motion to reopen and reconsider. Petitioner's objection to the basis of our decision is overruled.

Jessie James, Jr.
Chairman

Date: April 7, 1988